Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

SUSAN ROE, JR. AND JANE DOE, JR., PETITIONERS

v.

THE CITY OF WATERBURY AND PHILIP GIORDANO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS THE MAYOR OF WATERBURY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where respondent is a "strong mayor" who is the final policymaker for the City of Waterbury in the areas of law enforcement and citizen safety, does his conduct in making unsafe two young residents of his City by sexually abusing them over the course of nine months while in office and on City property render the City liable to the children under 42 U.S.C. § 1983?

2. Have the courts below undermined Rule 56's summary judgment procedure by deciding for themselves----instead of letting a jury determine----the crucial fact question of whether the respondent Mayor was exercising his authority as the City's final policymaker for law enforcement and citizen safety when he caused constitutional injury to petitioners, his constituents?

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OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Second Circuit in *Susan Roe, Jr., ppa Atty. Lynn Jenkins, Guardian ad Litem, and Jane Doe, Jr., ppa Atty. Allison Jacobs v. City of Waterbury and Philip Giordano, individually and as Mayor of the City of Waterbury*, C.A. No. 07-0261, decided September 11, 2008, reported at 542 F.3d 31(2nd Cir. 2008), affirming the grant of summary judgment by the District Court in favor of the respondent City, is set forth in the Appendix hereto(App. 1-22).

The published decision of the District Court for the District of Connecticut in *Jane Doe et al. v. City of Waterbury et al.*, Docket No. 03cv571, decided September 28, 2006, reported at 453 F. Supp. 2d 537(D. Conn. 2006), granting the respondent City's motion for summary judgment is set forth in the Appendix hereto(App. 23-55).

The unpublished Order of the United States Court of Appeals for the Second Circuit in *Susan Roe, Jr., ppa Atty. Lynn Jenkins, Guardian ad Litem, and Jane Doe, Jr., ppa Atty. Allison Jacobs v. City of Waterbury and Philip Giordano, individually and as Mayor of the City of Waterbury*, C.A. No. 07-0261, filed December 16, 2008, denying petitioners' petition for rehearing or, in the alternative, for rehearing *en banc*, is set forth in the Appendix hereto(App. 56).

JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit affirming the order of the District Court granting the respondent City's motion for summary judgment was decided on September 11, 2008; and its further order denying petitioners' timely filed petition for rehearing or, in the alternative, for rehearing *en banc* was filed and decided on December 16, 2008 (App. 1-22;56).

On March 9, 2009, this Court, Ginsburg, J., granted petitioners' application for an extension of time to file their petition until May 15, 2009(Docket No. 08A-788).

This petition for writ of certiorari is filed within the time allowed by Justice Ginsburg's order allowing petitioners to file their petition by May 15, 2009.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall...be deprived of life, liberty, or property, without due process of law....

United States Constitution, Amendment VII:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the

> right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

United States Constitution, Amendment XIII

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

United States Constitution, Amendment XIV, Section 1

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. Section 1331

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. Section 1343(a)(4)

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

...

(3) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights.....

Civil Rights Act–42 U.S.C. Section 1983

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

Fed. R. Civ. P. 56(c) and (e)(2)

(c). Serving the Motion; Proceedings.
....The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

....

(e)(2). Affidavits; Further Testimony.
....*Opposing Party's Obligation to Respond.* When a motion for summary judgment is properly made and supported, an opposing party

> may not rely merely on allegations or denials in its own pleading; rather, its response must—by affidavits or as otherwise provided in this rule---- set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

The City Charter for the City of Waterbury—Section 2101 and 2101(a)

> The mayor shall be the chief executive officer of the city....
>
> > It shall further be the duty of the mayor:
> > (a) To cause the laws and ordinances to be executed and enforced and to conserve the peace within the city and to be responsible for the good order and efficient government of the city.

The City Charter for the City of Waterbury—Section 2102(a) and (b)

> The mayor shall have power:
>
> > (a) To assume the entire control and direction of the police and fire forces of the city, or either of them, for a period not exceeding fifteen (15) days, at his discretion, in case of emergency, and to exercise all of the powers conferred upon the police and fire departments in relations thereto.

(b) To exercise, whenever necessary in order to suppress tumults, riotous or unlawful assemblies, within the limits of said city, all the powers given by law to sheriffs in relation to riotous assemblages; and at all times, when necessary, require the aid of any sheriff, deputy sheriff, constable or policeman, or any or all of them together, to assist him in executing the laws within the limits of the city.

STATEMENT

Under the charter for the respondent City of Waterbury, Connecticut ("respondent" or "the City") as well as under state law (Conn. Gen. Stat. § 7-193(a)(2)), its Mayor is its chief executive officer, the highest ranking officer and its final policymaker(App. 12). The City's charter establishes a "strong mayor" form of government where the Mayor is involved in all aspects of City government and establishes policy for the City at every level(*Id.*).

For example, the Mayor possesses the power to make personnel decisions, set department policies, create positions within City government and determine compensation rates for all City workers(App. 12). The Mayor is also obligated by the City Charter to "cause the laws and ordinances to be executed and enforced and to conserve peace within the city...." for the safety of all of its citizens(*Id.*). All budget proposals for every City department, including the budget for the City's Police Department, require the Mayor's review and

approval; and the Mayor plays a key role in the hiring and promoting of police officers(*Id.*).

In fact, the City's Police Department regularly alerts the Mayor of serious crime scenes and the Mayor would arrive there in his City-issued police cruiser and be briefed by the officer in charge (*Id.*). Moreover, the Mayor is empowered by the City charter to assume entire control of the Police Department in cases of emergency for a period not exceeding fifteen (15) days, exercising all the powers conferred on the Police Department.

The respondent Philip Giordano ("Giordano") was elected the City's Mayor in 1995 and served in this capacity until July 26, 2001(App. 3). While Mayor and consistent with his role as chief law enforcement officer of the City responsible for the safety of its citizens, Giordano regularly operated or was driven in an unmarked police vehicle equipped with sirens, lights and a police radio. He was assigned and used two different cellular phones paid for by the City. Giordano also carried a badge identifying himself as the Mayor; giving him arrest powers within the City.

As Mayor, Giordano was also the final policymaker for the City in the area of social issues. He promulgated the City's Sexual Harassment Policy which provides that sexual harassment is a violation of Title VII of the Civil Rights Act of 1964 as well as a violation of state law(App. 12-13). It prohibited City employees from using their authority to solicit subordinates for sexual favors; and it defined "sexual harassment" as "[u]nwanted physical contact, including

touching, pinching, brushing the body, coerced sexual intercourse [and] assault"(App. 13). In a memorandum accompanying his promulgation, the Mayor announced his intent to keep Waterbury a "fine place to live and work...."

Prior to his election as Mayor, Giordano knew one Guitana Jones ("Jones"), a prostitute and crack addict(App. 3). She provided Giordano with sexual favors in exchange for money(*Id.*). During his tenure as Mayor, they continued this relationship and upon Giordano's request on or about November of 2000, Jones brought to Giordano her then ten-year-old niece (petitioner Jane Doe, Jr.) and her then eight-year-old biological daughter (petitioner Susan Roe, Jr.) ("petitioners") for the purpose of having the Mayor sexually abuse them(*Id.*).

From this time until July of 2001, the Mayor, knowing their ages, solicited sexual acts from each of petitioners(*Id.*). In order to facilitate these encounters, the Mayor and Jones used cellular phones paid for and issued to the Mayor by the City; and Jones arranged for petitioners to be brought to the Mayor's office, the Mayor's home, the home of the City's Budget Director and the law office of the Mayor(*Id.*). All of these venues were used by the Mayor to sexually abuse petitioners; and all of this sexual abuse of petitioners took place while Giordano was acting in his official capacity as the City's Mayor, its Chief Executive Officer(App. 3-4;12).

In fact, the Mayor used the City's vehicles, the City's telephones and City property to carry out his sexual abuse of petitioners. The sexual abuse took place

in the Mayor's car, inside the Mayor's office, at the Mayor's law office and at his personal residence. During these encounters, the Mayor used his status as the City's Chief Executive Officer and the person primarily responsible for the enforcement of the law within the City to intimidate both Jones and petitioners by telling them that he could put Jones in jail if they disclosed this activity(App. 4).

During an investigation by the FBI and the IRS of political corruption in the City of Waterbury, telephone surveillance intercepted calls between the Mayor and Jones, leading to the Mayor's arrest on July 26, 2001, for criminally depriving petitioners of their constitutional rights under 18 U.S.C. § 242 (App. 3-4;22). A superceding indictment charged Giordano criminally with 18 counts of unlawful activity stemming from his sexual abuse of petitioners(App. 4;25). On March 25, 2003, a jury found Giordano guilty of 17 of the 18 counts, including two counts charging him with acting under color of law to deprive petitioners of their constitutional rights to be free from unwanted sexual abuse(App. 4;25). The federal district court denied Giordano's motion to set aside the verdict and the court of appeals eventually affirmed the conviction in *United States v. Giordano*, 443 F.3d 30(2nd Cir. 2006)(App. 4;25).

About four months after Giordano was arrested in 2001, each of the petitioners began in the district court for the District of Connecticut their own civil action against Giordano in both his individual and official capacities, and against the City as well seeking damages for violations of 42 U.S.C. § 1983, and state

law violations based on the same conduct which resulted in Giordano's convictions (App. 4;25). By 2005, each of petitioners had moved for summary judgment against the City and Giordano contending *inter alia* that they were collaterally estopped in the aftermath of Giordano's criminal trial from relitigating the issue of whether petitioners' fourteenth amendment right to their bodily integrity had been violated; and that there was no genuine issue of material fact as to whether the City was the "moving force" behind the violations of petitioners' rights because Giordano acted as the City's authorized final policymaker when he caused petitioners' constitutional injuries(App. 4-5;25).

The City responded with its own motion for summary judgment contending that Giordano's actions did not represent official policy of the City and accordingly there was no basis for holding it liable under § 1983 for his actions and that the factual and legal issues decided in Giordano's criminal trial were not identical to those presented in these civil actions(App. 5). Giordano did not respond except to file at oral argument a copy of his petition for rehearing *en banc* filed in the court of appeals in the wake of its affirmance of his criminal conviction(App. 5;25-26).

After consolidating petitioners' separate civil actions, the District Court, Underhill, J., considered whether the City could be held liable for damages under § 1983 stemming from Giordano's conduct in sexually abusing petitioners while he was their Mayor(App. 22;23-39). In making this determination, the motion judge properly found as a fact on this record that the City *admitted* that Giordano was its final

policymaker in the areas of political rights, social issues, law enforcement and the safety of its citizens(App. 32). However, the City

> argue[d] that his actions in this particular case exceeded the bounds of the authority granted to him by [the City]. As such, Giordano's unauthorized personal actions cannot be said to fairly represent the official policy of Waterbury, nor would it be fair to characterize Waterbury as the moving force behind Giordano's actions.

(App. 32).

In response, petitioners argued that the City has a "strong mayor" form of government where the Mayor is involved in all aspects of City government and establishes policy for the City at every level, that the Mayor is its chief executive officer, its highest ranking officer, its chief law enforcement officer and its final policymaker in the areas of political rights, social issues, law enforcement and the safety of its citizens. Accordingly, they contended the Mayor's conduct in making unsafe two of the City's young residents by sexually abusing them while serving in office and during normal business hours on City property was despite its illegality a policy of misconduct set by the City's final policymaker in the area of law enforcement and the safety of its citizens, areas within the purview of the Mayor's policymaking authority, thereby binding the City to liability under § 1983.

The district judge, however, concluded that Giordano's decision to sexually abuse petitioners was

not one for which the City could be held responsible in damages because "Giordano's actions did not constitute an official policy of Waterbury" since to do so would mean imposing vicarious liability on the City via *respondeat superior* theory of liability, a prohibited way of assigning municipal responsibility after *Monell v. New York City Dept. of Social Services*, 436 U.S. 658(1978); because although Giordano was "generally a final policymaker for Waterbury," his actions could not be fairly said to represent official policy since he exceeded the bounds of the authority granted him under the City charter; and while Giordano used the powers of his office to carry out the abuse here, it did not establish an official policy for the City but rather only satisfied the "color of law"element for a § 1983 claim(App. 31-41).

Essentially, the district court reasoned that since Giordano's actions contravened the City's official policies, he could not be acting in his policymaking capacity when he sexually abused petitioners; and the City was therefore not the "moving force" behind his actions(App. 33-36). As the District Judge concluded, the City's policy was to stop and prevent sexual abuse and Giordano's actions, taken purely for personal gratification instead of for any cognizable reason having to do with the City's interests, contravened this policy(App. 34-35). Moreover, even if the Mayor committed this constitutional tort in the course of his efforts to enforce the law, the motion judge determined that Giordano was *not* enforcing the law, he was breaking the law for his personal gratification and therefore could not bind the City for purposes of § 1983(App. 36-37).

That is, even though the City charter gave the Mayor broad, sweeping powers and authority in the areas of public safety, law enforcement and social issues, he could not bind the City in these areas when he acts outside of the scope of authority granted him by the City charter; and that charter does not include performing illegal acts like abusing petitioners(App. 36-37). Thus, "[h]is actions at issue in this case are too far removed from the powers given him by Waterbury to manage the city to impose liability on Waterbury" and there was no issue for a jury to find that the official policy element of petitioners' municipal liability claims has been met(App.38-39;43).

Summary judgment thereupon entered against petitioners on these claims(App. 43). For the same reasons, summary judgment was entered in favor of the City on petitioners' § 1983 claims against Giordano in his official capacity as the City's Mayor since these claims were just another way of asserting § 1983 claims against the City(App. 43-44). In addition, with respect to petitioners' state law claims against the City, the District Judge ruled that governmental immunity shields the City from liability for Giordano's actions(App. 43). Finally, the lower court granted petitioners' motion for summary judgment against Giordano in his individual capacity on their federal and state claims based not on collateral estoppel principles but because Giordano's insufficient response to petitioners' motion left undisputed facts in the record warranting this result(App. 44-51).

Upon petitioners' appeal from these rulings, the court of appeals unanimously affirmed the district

court(App. 1-22). Addressing the City's liability under § 1983, the court decided that even if-----as the City conceded below for the purpose of petitioners' summary judgment motion---- Giordano as its Mayor was the final policymaker in the areas of political rights, social issues, law enforcement and the safety of its citizens, areas which arguably included his abusive acts toward petitioners, he could not have been "an official policymaker with respect to the area of policy that encompassed his *tortious acts*"(App. 11)(emphasis supplied). As the court put it, decisions to sexually abuse young children are demonstrably not made for reasons in the City's interests and the municipality therefor cannot be said to be to be the "moving force" behind this conduct(App. 11-12).

Stated another way, "it cannot be said that the Mayor had policymaking authority with respect to the acts of sexual abuse he committed;" and the City's charter did not empower the Mayor to change or to violate clearly established law(App. 13).

It concluded:

> Here...the actions taken by Giordano were in an area in which he was not a policymaker. Giordano has no authority to make policy authorizing, condoning, or promoting the sexual abuse of children. Regardless of what broad powers he had as a mayor, the state of Connecticut has made the policy (and the laws) prohibiting such conduct.
>
> ....

> A finding of municipal liability in this case would amount to a finding of *respondeat superior* and would be an unwarranted extension of the single-act rule set forth in *Pembaur* [*v. City of Cincinnati*, 475 U.S. 469 (1986)....An official acts within his official policymaking capacity when he acts in accordance with the responsibility delegated him under state law for making policy in that area of the municipality's business.

(App. 16;18). Because there were no facts on this record from which it could reasonably be found that Giordano was furthering any official policy of the City when he undertook this conduct, summary judgment in the City's favor was justified(App. 18-19). The court of appeals also affirmed the district court's ruling on the issues of collateral estoppel and the viability of petitioners' state law claims(App. 19-21).

On December 16, 2008, the court of appeals denied petitioners' timely filed petition for rehearing or, in the alternative, for rehearing *en banc*(App. 56). On March 9, 2009, this Court, Ginsburg, J., granted petitioners' application for an extension of time to file their petition until May 15, 2009 (Docket No. 08A-788).

REASONS FOR GRANTING THE PETITION

1 The Decision Below Nullifies This Court's Precedent Defining the Allowable Reach f Municipal Liability Under 42 U.S.C. § 1983.

Congress enacted 42 U.S.C. § 1983, with the central aim to provide protection to those persons wronged by the "'[m]isuse of power, possessed by

virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law....'" *Owen v. City of Independence, Missouri*, 445 U.S. 622, 650-651(1980) quoting *Monroe v. Pape*, 365 U.S. 167, 184(1961) and *United States v. Classic*, 313 U.S. 299, 326(1941). By creating an express federal remedy, Congress sought to "enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority *or misuse it."Hafer v. Melo*, 502 U.S. 21, 28(1991) quoting *Scheuer v. Rhodes*, 416 U.S. 232, 243(1974) and *Monroe v. Pape*, 365 U.S. at 171-172(emphasis supplied).

When a person injured by a municipality's misconduct seeks to hold the municipality itself liable under § 1983, a majority of this Court in *Monell v. New York City Dept. of Social Services*, 436 U.S. at 691-695, held that "a municipality cannot be held liable solely because it employs a tortfeasor or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Id.* at 691(1978). "Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694. See *Canton v. Harris*, 489 U.S. 378, 385(1989) quoting *Springfield v. Kibbe*, 480 U.S. 257, 267(1987) (O'Connor, J., dissenting)("It is only when the 'execution of the government's policy or custom....inflicts the injury' that the municipality may be held liable under § 1983").

It is not enough for a § 1983 plaintiff merely to identify the actionable conduct properly attributable to the municipality. *Board of Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 404(1997). Instead, the plaintiff "must also demonstrate that, through its *deliberate* conduct, the municipality was the 'moving force' behind the injury alleged." *Id.*(emphasis in original). That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights. *Id.* As the Court in *Brown* concluded,

> proof that a municipality's legislative body or authorized decisionmaker has intentionally deprived a plaintiff of a federally protected right necessarily establishes that the municipality acted culpably. Similarly, the conclusion that the action taken or directed by the municipality or its authorized decisionmaker itself violates federal law will also determine that the municipal action was the moving force behind the injury of which the plaintiff complains.

Id. at 404-405.

In *Pembaur v. Cincinnati*, 475 U.S. 469, 480-484(1986), a plurality of this Court speaking through Justice Brennan, made three things clear: (1) that municipal liability under § 1983 attaches only where the decisionmaker who possesses final authority for establishing policy with respect to that area of the city's business in issue makes a deliberate choice or choices from among various alternatives to do or not to do

something and this choice or choices cause(s) constitutional injury; (2) only those municipal officials who have "final policymaking authority" will by their own actions subject the government to § 1983 liability; and (3) whether a particular official has "final policymaking authority" is a question of state law. *Id. Accord, Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 737(1989). See *St. Louis v. Praprotnik*, 485 U.S. 112, 125 & n. 2(1988).

As Justice Brennan made clear in his concurring opinion in *Praprotnik*,

> as long as the contested decision is made in an area over which the official or legislative body *could* establish a final policy capable of governing future municipal conduct, it is both fair and consistent with the purposes of § 1983 to treat the decision as that of the municipality itself, and to hold it liable for the resulting constitutional deprivation.

485 U.S. 140(emphasis in original).

Thus the unmistakable law of this Court is that if Giordano under Connecticut law was the City's "final policymaking authority" for law enforcement and citizen safety issues at the various times he made his decisions about his conduct with petitioners from November of 2000 through July of 2001, and these choices he made about his conduct caused petitioners constitutional injury, then the City will be liable to petitioners under § 1983. This is because the choice of policy by Giordano as the City's final policymaking

authority "and its implementation are one, and the first and only action will suffice to ground municipal liability simply because it is the very policymaker who is acting." *Pembaur*, 475 U.S. at 480-481.

Here the City *admitted* for purposes of summary judgment that under Connecticut law Giordano was the final policymaker for the City in the areas of political rights, social issues, law enforcement and the safety of its citizens. The City's admission was well made since under the charter for the City as well as under state law (Conn. Gen. Stat. § 7-193(a)(2)), Giordano as its Mayor was its chief executive officer, the City's highest ranking officer and its final policymaker in this "strong mayor" form of government where he was involved in all aspects of City government and established policy for the City at every level(*Id.*).

Nor is there any arguable question for purposes of summary judgment that Giordano's final policymaking authority in the crucial areas of law enforcement and the safety of the City's citizens encompassed the right of petitioners as residents of the City to be safe and to be free from sexual abuse or other insults to their physical integrity while living there. That is, a central part of the City's "business," *Proprotnik*, 485 U.S. at 123, is its obligation to provide for the safety of its citizens, especially its youngest citizens; and Giordano as its Mayor had unfettered authority under both the City charter and state law to set policy in these particular areas not only by his own conduct but also by his control of all of the City's law enforcement agencies.

Thus the Mayor's behavior in making unsafe two of the City's youngest residents by sexually abusing them over a period of nine months while he was serving as Mayor during normal business hours on City property was despite its illegality a policy of misconduct set by the City's final policymaker in the particular areas of law enforcement and the safety of its citizens. Since these areas of the City's business were admittedly within the purview of the Mayor's policymaking authority, the City should have been held liable to petitioners under § 1983 for their constitutional injuries. *McMillian v. Monroe County Alabama*, 520 U.S. 781, 785-786(1997). *Jett*, 491 U.S. at 737. *Proprotnik, supra. Pembaur*, 475 U.S. at 481.

Consistent with this Court's analysis in *McMillian*, 520 U.S. at 785, Giordano set policy for the City on the "particular issues" of law enforcement and citizen safety; and his conduct in these particular areas of the City's business led to constitutional harm to petitioners. See *Jeffes, Keenan et al. v. Barnes*, 208 F.3d 49, 57-59(2nd Cir. 1998); *Bennett v. Pippin*, 74 F.3d 578, 586(5th Cir. 1992); *Turner v. Upton County, Tex.*, 915 F.2d 133, 136-137(5th Cir.1990). The City therefore should have been held liable to petitioners under § 1983.

There is *no* support in this Court's decisions for refusing to impose § 1983 liability simply because the City's final policymaker Giordano was not acting in furtherance of some legitimate or legal municipal goal, as both of the courts below have done. The fact that Giordano as the City's final policymaker in the areas of law enforcement and citizen safety abused that authority and subjected petitioners to repeated illegal

sexual assaults is not a reason to relieve the City from liability. The entire thrust of § 1983 reflects Congress' intent to provide redress for citizens for the *misuse* of government power, made possible only because the wrongdoer is clothed with the authority of state law. *Owen v. City of Independence, Missouri*, 445 U.S. at 650-651 quoting *Monroe v. Pape*, 365 U.S. at 184. See *Hafer v. Melo*, 502 U.S. at 28. It is the *misuse* of government power by one entitled to wield that power which triggers the protection of § 1983 and entitles petitioners to relief against the City.

Stated another way, there is *no* support in the decisions of this Court to conclude that in order for the City to be liable under § 1983 for injuries resulting from his conduct, Giordano as the City's chief policymaker in the areas of law enforcement and citizen safety must always be legitimately exercising his authority in these areas for some positive purpose. Instead, as the City's chief policymaker in these areas, Giordano possessed the power to bind the City *even for his misdeeds, however craven*, as long as he was exercising his final policymaking power and authority in the areas of law enforcement and citizen safety; and it was a jury question whether he was doing so when he made petitioners, his young constituents, unsafe by sexually abusing them over the course of nine months while in office and on City property. The conclusion otherwise by the court of appeals and the district court nullifies *Monell, McMillian, Jett, Proprotnik* and *Pembaur*.

It would be "uniquely amiss" if the City itself was permitted to disavow liability for the injuries it has begotten by its adoption of a "strong Mayor' form of

government and the *carte blanche* authority at every level which it bestowed upon Giordano as its Mayor. *Adickes v. Kress & Co.*, 398 U.S. 144, 190(1970)(Brennan, J., concurring in part and dissenting in part). A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, especially when one of the wrongdoers is a municipal institution which was formed precisely in order to protect its citizens from harm.

Imposing liability on the City for these young petitioners' injuries does not distort the law of relief under § 1983. After all, § 1983 was intended not only to provide compensation to the victims of past abuses but also to serve as a deterrent against future constitutional deprivations. See *Robertson v. Wegmann*, 436 U.S. 584, 590-591(1978); *Carey v. Piphus*, 435 U.S. 247, 256-257(1978). The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for municipal officials to curb executive excesses wherever and whenever they are discovered and to err on the side of protecting citizens' constitutional rights in all circumstances. Recognizing the City's § 1983 liability is fair and equitable on this record and accomplishes the ameliorative purposes of the statute which Congress intended.

2. The Courts Below Have Misused Rule 56's Summary Judgment Procedure And Denied Petitioners A Trial On Their Claims By Weighing Evidence and Finding Facts In Order to Dispose of the Crucial Fact Question Whether Respondent Giordano Was Exercising His Authority as the City's Final Policymaker When He Caused Injury to Petitioners.

The seventh amendment to the federal constitution provides that in suits at common law, "the right of trial by jury shall be preserved...." As Justice Scalia observed in *Blakely v. Washington*, 542 U.S.296, 305-306(2004), the right to a jury trial in civil cases is a fundamental "reservation of power in our constitutional structure," assuring the people's ultimate control of the judiciary. *Id.* citing 2 *The Complete Anti-Federalist* 315, 320(H. Storing ed. 1981). This guaranty of a jury trial in the Constitution and the common law traditions it entrenches "do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury."*Id.* at 313 citing 3 Blackstone, *Commentaries*, at 373-374; 379-381.

Since one of the fundamental duties of the jury in civil cases is to resolve factual disputes bearing on material issues in controversy, summary judgment procedure under Fed. R. Civ. P. 56 does not violate a party's constitutional right to a jury trial because it is presumed that if the entry of summary judgment is appropriate, there are no genuine issues of material fact for trial and therefore no right to a trial, with or without a jury, is implicated. *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 320(1902). See also *Pease*

v. Rathbone-Jones Eng. Co., 243 U.S. 273, 278-279(1917).

However, both federal jurists and legal commentators have concluded that federal trial judges regularly overuse summary judgment in order to take triable cases away from juries. Hon. W.G. Young, *Vanishing Trials–Vanishing Juries–Vanishing Constitution*, 40 Suffolk U. Law Rev. 67, 78 (2006). Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day In Court And Jury Trial Commitments?*, 78 N.Y.U. Law Rev. 982, 1064; 1066;1071-1072;1133-1134(2003). See Burns, Robert P., *The Death of the American Trial*(2009). As Professor Miller observes, Rule 56's "paper trials" of crucial, disputed fact issues

> would be an unfortunate break with the past. Our civil dispute resolution system has always preferred adjudication based on oral testimony in open court subject to cross examination....[T]hey are considered aspects of what often is referred to as a "day in court," with due process embracing notions of a fair trial before an impartial tribunal.

Id. at 1072 & n. 476, citing *Societe Internationale Pour Participations Industrielles et Commerciales S.A. v. Rogers*, 357 U.S. 197, 209(1958)("There are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his case."). See also Thomas,

Suja A., *Why Summary Judgment Is Unconstitutional*, 93 Va. L. Rev. 139, 143-144;158-160;177-178(2007).

This misuse of summary judgment procedure has been documented. One scholar concludes that federal courts routinely weigh evidence, draw inferences in favor of the moving party and make credibility determinations. McGinley, Ann C., *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. Rev. 203, 229(1993). Likewise, courts often reject the plaintiffs' attempts to create inferences of intent and motive through a totality of circumstantial evidence, thereby creating a triable issue, by treating the evidence in a piecemeal fashion, isolating and rejecting as insufficient each of the discrete elements of the plaintiffs' evidence rather than considering their cumulative effect. *Id.* at 233-236.

Here, even though the City *admitted* for the purposes of summary judgment that respondent Giordano was the final policymaker for the City in the areas of political rights, social issues, law enforcement and the safety of its citizens, the motion judge as well as the court of appeals, contrary to the procedure of Rule 56, ignored this crucial admission of fact and decided for themselves the fact question whether Giordano was exercising his authority as the City's final policymaker during the time he caused injury to petitioners. In doing so, the district judge and the court of appeals improperly resolved this crucial jury question *against* petitioners by construing the summary judgment materials *against* them and by concluding that Giordano was not----indeed, he could

not have been----an official final policymaker with regard to the area of activity which encompassed his tortious acts. This is a wrong treatment of the summary judgment materials in order to reach a result which (for the reasons identified in Part 1., *supra*) is not supported by the decisions of this Court.

The court of appeals and the district judge thereby usurped the role of a jury by making findings of fact about this determinative issue. Petitioners deserved a jury trial on crucial fact questions and denying them this opportunity is not only unfair but also unconstitutional. These were crucial fact questions for a factfinder on this record, not for a judge upon summary judgment. They were central to this litigation and deserved to be decided by a jury under proper instructions. They are:(1) whether Giordano was acting within his final policymaking authority when he abused petitioners; and (2) whether the Mayor's conduct in making unsafe two young residents of the City while in office serving as Mayor on City property was despite its illegality a policy of misconduct set by the Mayor as the City's final policymaker for law enforcement and citizen safety, thereby subjecting the City to liability under § 1983?

As Justice Brennan observed in his concurring opinion in *Praprotnik*, "juries can and must find the predicate facts necessary to a determination whether a given official possesses final policymaking authority....The identification of municipal policymakers is an essentially factual determination 'in the usual sense,' and is therefore rightly entrusted to a properly instructed jury."

485 U.S. at 143-144. Moreover, as this Court noted in *Jett v. Dallas Independent School Dist.*, 491 U.S. at 737,

> "[o]nce those officials who have the power to make official policy on a particular issue have been identified, it is for the jury to determine whether *their* decisions have caused the deprivation of rights at issue by policies which affirmatively command that it occur, see *Monell*, 436 U.S. at 661, n. 2....

Id.(emphasis in original).

This misuse of Rule 56 procedure leaves petitioners, two minor girls, with no meaningful redress for the constitutional injuries each has endured. Giordano's criminal conviction has left him without assets to satisfy any damage award petitioners could obtain against him; the City represents the only defendant capable of providing some kind of relief to petitioners for their injuries and it is unfair and inequitable to skew the Rule 56 protocol in such a manner that the inferences of the summary judgment materials are construed *against* petitioners as the non-moving parties, denying them their day in court against the City on their claims for damages under § 1983.

This result invokes this Court's power of superintendency over the federal courts to reassert their proper role in deciding summary judgment motions, i.e., reaffirming the thrust of *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-151(2000) and *Anderson v. Liberty Lobby*, 477 U.S. 242, 249-255(1986), which require them to draw all

inferences in favor of the nonmoving parties and to refrain from making any credibility determinations in order to resolve material factual disputes because this is a function of the factfinder, not a judge upon summary judgment.

CONCLUSION

For all of these reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit and, ultimately, to vacate and reverse the judgment and remand the matter to the United States District Court for the District of Connecticut, with instructions that petitioners' claims against the respondent City for violation of their civil rights be tried to a jury; or provide petitioners with such other relief as is fair and just in the circumstances of this case.

Respectfully submitted,

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(any footnotes trail end of each document)

Docket No. 07-0261-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUSAN ROE, Jr., ppa ATTY. LYNN JENKINS, GUARDIAN AD LITEM, and JANE DOE, Jr., ppa ATTY. ALLISON JACOBS,

Plaintiffs-Appellants,

v.

THE CITY OF WATERBURY, and PHILIP GIORDANO, I/O MAYOR OF THE CITY OF WATERBURY,

Defendants-Appellees.

May 16, 2008, Argued

September 11, 2008, Decided

COUNSEL: ERSKINE D. MCINTOSH, The Law Offices of Erskine D. McIntosh, P.C., Hamden, CT, for Plaintiff-Appellant, Susan Roe, Jr.

GERALD HARMON, The Law Offices of Gerald Harmon, Meriden, CT, for Plaintiff-Appellant, Susan Roe, Jr.

MICHAEL S. HILLIS, Dombroski, Knapsack, & Hill, L.L.C., New Haven, CT, for Plaintiff-Appellant, Jane Doe, Jr.

ELLIOT B. SPECTOR, Noble, Spector, Young, & O'Connor, P.C., Hartford, CT, for Defendant-Appellee.

JUDGES: Before: JACOBS, MINER, Circuit Judges, and McAVOY, District Judge. *

OPINION BY: MINER

OPINION

MINER, *Circuit Judge:*

Plaintiffs-appellants, Susan Roe, Jr. and Jane Doe, Jr. (collectively, the "Plaintiffs"), appeal from a summary judgment entered on September 28, 2006 which was certified and entered as a final partial summary judgment on November 16, 2006, in the United States District Court for the District of Connecticut (Underhill, *J.*) in favor of defendant-appellee the City of Waterbury (the "City" or "Waterbury"). The District Court held that the City could not be held liable under 42 U.S.C. § 1983 for acts of sexual abuse committed by the former Mayor of Waterbury, Philip Giordano ("Giordano" or the "Mayor"), because, although Giordano was a final policymaker, he was not acting in his official capacity when he sexually abused Plaintiffs. The District Court also concluded that the City could not be collaterally estopped from relitigating the issue of whether Giordano was acting under "color of law" when he committed the tortious acts because the Plaintiffs could not show that the color of law issue litigated in

Giordano's criminal trial was identical to the color of law issue presented here. The District Court further held that Connecticut's governmental immunity statute barred Plaintiffs' state law claims against the City. For the reasons that follow, we affirm the judgment of the District Court.

BACKGROUND

Giordano was elected Mayor of the City of Waterbury, Connecticut, in 1995. Between November 2000 and July 2001, Giordano sexually abused the Plaintiffs on numerous occasions at the mayor's office, in his home, and in his city-issued police cruiser.

At some time before Giordano was elected Mayor, he met Guitana Jones ("Jones"). Thereafter, Jones, a prostitute and crack addict, provided Giordano with sexual favors in exchange for money. These encounters occurred until Giordano's arrest. During the Summer of 2000, Giordano requested that Jones introduce younger women to him. In response, Jones brought her niece, then ten-year-old plaintiff Jane Doe, Jr., and her biological daughter, then eight-year-old plaintiff Susan Roe, Jr., to the Mayor. From approximately November 2000 until July 2001, Giordano solicited sexual acts from Roe and Doe, during which time he was aware of their ages. Giordano arranged with Jones for those sexual encounters through the use of cellular telephones paid for and issued by the City of Waterbury.[1]

On July 26, 2001, Giordano was arrested and charged, *inter alia*, with depriving the Plaintiffs of their constitutionally protected rights under 18 U.S.C. § 242. *See Doe v. City of Waterbury*, 453 F. Supp. 2d 537, 540

(D. Conn. 2006). During Giordano's criminal trial, Roe and Doe separately testified about the sexual acts that they performed during their encounters with the Mayor. Roe further testified that after each encounter Giordano declared that if she told anyone about the sexual acts, her mother would go to jail. On March 25, 2003, a jury found Giordano guilty of 17 of the 18 counts, including the two counts charging Giordano with acting under color of law to deprive Doe and Roe of their constitutional rights to be free from unwanted sexual abuse, in violation of 18 U.S.C. § 242. The District Court denied Giordano's motion to set aside the verdict, and this Court affirmed Giordano's conviction. *See United States. v. Giordano*, 442 F.3d 30 (2d Cir. 2006).

About four and one-half months after Giordano was arrested, on December 7, 2001, Roe commenced a civil action against Giordano, in both his official and individual capacities, and against the City of Waterbury seeking damages for violations of 42 U.S.C. § 1983 and state law violations based on the same conduct that resulted in Giordano's convictions. Doe initiated a similar action on December 5, 2001 against Giordano and the City, also alleging violations of 42 U.S.C. § 1983 and state law.

On August 18, 2005, Roe moved for summary judgment, claiming that (1) the issue of the violation of her Fourteenth Amendment right to bodily integrity previously was litigated in Giordano's criminal trial and decided in her favor, and (2) defendants should therefore be collaterally estopped from relitigating that issue. Doe also moved for summary judgment on October 31, 2005, arguing that: (1) there was no genuine

issue of material fact as to whether Giordano acted under color of law in violating her right to bodily integrity under the Fourteenth Amendment; (2) no genuine issue of material fact existed as to whether Giordano violated Doe's rights under state law; and (3) there was no genuine issue as to whether the City "was the moving force behind the violations of [Doe's] rights because [Giordano] acted as the City's authorized final policymaker." In addition, Doe argued that Giordano's criminal conviction should estop both Giordano and the City from relitigating the issue of whether Giordano deprived Doe of her rights under color of state law.

On December 1, 2005, the City filed a motion seeking summary judgment against Roe and Doe,[2] arguing that (1) Giordano's actions did not represent any official policy of Waterbury and, therefore, as a matter of law, there was no basis for holding the City liable under 42 U.S.C. § 1983 for his actions; and (2) collateral estoppel does not apply to the City because (a) it is not in privity with Giordano, and (b) the legal and factual issues decided in Giordano's criminal trial are not identical to those presented in the civil actions. As of April 4, 2006, when the District Court heard arguments on the parties' summary judgment motions, Giordano had not responded to the Plaintiffs' motions for summary judgment. At oral argument on the parties' summary judgment motions, in lieu of a response, Giordano submitted a copy of his 2006 Petition for Rehearing En Banc to the Second Circuit Court of Appeals. On September 28, 2006, the District Court granted Plaintiffs' summary judgment motion against Giordano as to the claims brought against him in his individual capacity but denied summary judgment as to the claims against Giordano in his official capacity. The District

Court also granted the City of Waterbury's summary judgment motion dismissing all claims brought against the City. *Doe*, 453 F. Supp. 2d at 537.

On November 16, 2006, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the District Court granted Plaintiffs' motion seeking certification of partial summary judgment and directed entry of partial final judgment in favor of Waterbury with respect to all claims against Waterbury.

On January 19, 2007, Plaintiffs timely appealed the September 28, 2006 order to the extent that the claims were certified and entered as a final judgment in the November 16, 2006 order.

ANALYSIS

I. *Jurisdiction*

Because Plaintiffs appeal the final judgment the District Court entered in favor of Waterbury on November 16, 2006, pursuant to Rule 54(b), we have jurisdiction pursuant to 28 U.S.C. § 1291, which grants jurisdiction over "appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291.

II. *Standard of Review*

We review a grant of summary judgment *de novo*. *State Street Bank & Trust Co. v. Salovaara*, 326 F.3d 130, 135 (2d Cir. 2003). Summary judgment shall be "rendered if the pleadings, the discovery and disclosure materials on the files, and any affidavits show that there is no genuine issue as to any material fact and that the

movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue of fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A fact is material if it "might affect the outcome of the suit under the governing law." *Id.*

This standard dictates that courts must "resolve all ambiguities, and credit all factual inferences that could rationally be drawn, in favor of the party opposing summary judgment." *Brown v. Henderson*, 257 F.3d 246, 251 (2d Cir. 2001) (internal quotation marks and citation omitted). Once the moving party demonstrates that there are no genuine issues of material fact, the nonmoving party "must come forth with evidence sufficient to allow a reasonable jury to find in [its] favor." *Id.* at 251 (internal citation omitted). Thus, a nonmoving party can defeat a summary judgment motion only "by coming forward with evidence that would be sufficient, if all reasonable inferences were drawn in [its] favor, to establish the existence of [an] element at trial." *Grain Traders, Inc. v. Citibank, N.A.*, 160 F.3d 97, 100 (2d Cir. 1998) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); Fed. R. Civ. P. 56(c)).

III. *Municipal Liability Pursuant to 42 U.S.C. § 1983*

The Plaintiffs claim that the District Court erred in granting the City's motion for summary judgment dismissing all claims against it based on the sexual abuse committed by Giordano. Specifically, Plaintiffs argue that the municipality should be held liable under § 1983 because: (1) Giordano was a final policymaker for

the City; and (2) he was acting within his official policymaking capacity when he sexually abused Plaintiffs. The City contends that the Mayor was neither fulfilling nor acting within the scope of his official policymaking duties when he sexually abused Plaintiffs, and, therefore, § 1983 liability cannot attach to the City. The District Court granted the City's summary judgment motion and denied Plaintiffs' motions for summary judgment on the grounds that the City cannot be held liable where the Mayor did not commit the tortious acts while acting in his official policymaking capacity.

A. Municipal Liability Based on Acts of Officials

Section 1983 provides, in pertinent part:

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .42 U.S.C. § 1983. In order to prevail on a claim against a municipality under section 1983 based on acts of a public official, a plaintiff is required to prove: (1) actions taken under color of law; (2) deprivation of a constitutional or statutory right; (3) causation; (4) damages; and (5) that an official policy of the municipality caused the constitutional injury. *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690-91, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). The fifth element -- the "official policy" element -- can only be satisfied where a plaintiff proves that a "municipal policy of some

nature caused a constitutional tort." Id. at 691. "In other words, a municipality may not be found liable simply because one of its employees committed a tort." *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 405, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997).

The Supreme Court has made clear that "a municipality cannot be made liable" under § 1983 for acts of its employees "by application of the doctrine of *respondeat superior*." *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 478, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986); *see also City of St. Louis v. Praprotnik*, 485 U.S. 112, 122, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988) ("[G]overnment bodies can act only through some natural persons[; therefore] governments should be held responsible when, and only when, their official policies cause their employees to violate another person's constitutional rights."). "Liability for unauthorized acts is personal; to hold the municipality liable, *Monell* tells us, the agent's actions must implement rather than frustrate the government's policy." *Auriemma v. Rice*, 957 F.2d 397, 400 (7th Cir. 1992). Therefore, a plaintiff must demonstrate that, through its deliberate conduct, the municipality was the "moving force" behind the alleged injury. *Brown*, 520 U.S. at 404.

B. Municipal Liability for Single Act of Final Policymaker

Where a plaintiff seeks to hold a municipality liable for a "single decision by [a] municipal policymaker[]," *Pembaur*, 475 U.S. at 480, the plaintiff must show that the official had final policymaking power, *see Praprotnik*, 485 U.S. at 123 (explaining that "only those municipal officials who have 'final policymaking

authority' may by their actions subject the government to § 1983 liability"). Moreover, the challenged actions must be within that official's area of policymaking authority. *Id.* (explaining that, pursuant to *Pembaur* "the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area of the city's business); *see also Jeffes v. Barnes*, 208 F.3d 49, 57 (2d Cir. 2000) (explaining that the government official must be a final policymaker with respect to the particular conduct challenged in the lawsuit).

An official has final authority if his decisions, at the time they are made, "may fairly be said to represent official policy." *McMillian v. Monroe County, Alabama*, 520 U.S. 781, 784, 117 S. Ct. 1734, 138 L. Ed. 2d 1 (1997); *see Anthony v. City of New York*, 339 F.3d 129, 139 (2d Cir. 2003). Whether an official has final policymaking authority is a legal question, determined on the basis of state law. *Jeffes*, 208 F.3d at 57. As stated, the critical inquiry is not whether an official generally has final policymaking authority; rather, the court must specifically determine whether the government official is a final policymaker with respect to the particular conduct challenged in the lawsuit. *Id.* (internal citations omitted).

C. Whether Giordano was a Final Policymaker for the Relevant Area of Policy

Plaintiffs argue that Waterbury is liable for Giordano's actions because he was the Mayor and final policymaker of the City in the areas of law enforcement, safety, and social issues; and as a result he had final policymaking authority over the area of conduct that included his

abusive acts. Doe asserts that the City of Waterbury's Charter created a "strong mayor" form of government that provided Giordano with exceptionally broad supervisory appointment, budgetary, and oversight powers. Plaintiffs further claim that Giordano acted within his official policymaking capacity because he used the City's cellular phones to arrange for the sexual encounters, many of which occurred in the Mayor's office and in an unmarked police cruiser. Plaintiffs' theory is that when Giordano acted, it was as if the City acted, such that Giordano was the "government itself," and his actions therefore fairly represented the official policy of Waterbury.

The City responds that Giordano could not have been a final policymaker with respect to the area of policy encompassing his tortious conduct, because that conduct was purely personal and could not be said to represent any policy of the City. The City further argues that even if Giordano was an official policymaker in some respects, he was not implementing official policy when he sexually abused Plaintiffs. The City argues that the Plaintiffs' theory amounts to a *respondeat superior* argument and, according to Plaintiffs' argument, any tort committed by the Mayor would constitute official policy.

We agree with the City that Giordano was not an official policymaker with respect to the area of policy that encompassed his tortious acts. "An official has final authority if his decisions, at the time they are made, for practical or legal reasons constitute the municipality's final decisions." *Anthony v. City of New York*, 339 F.3d 129, 139 (2d Cir. 2003). Decisions to sexually abuse young children are not "made for practical or legal

reasons" and are not in any way related to the City's interests. The City cannot be said to be the "moving force" behind the abuse. *See Brown*, 520 U.S. at 404.

As the Mayor of Waterbury, Giordano was the Chief Executive Officer of the City under both the municipality's Charter and state law. *See* CONN. GEN. STAT. § 7-193(a)(2). We agree that the Mayor's powers were generally broad. For example, § 2102(e) of the City's Charter delegated to the Mayor the power over personnel functions, including setting departmental policies, creating positions, and establishing compensation rates. The City's Charter also granted the Mayor enforcement powers. Section 2101(a) provided that the Mayor's duties were to "cause the laws and ordinances to be executed and enforced and to conserve the peace within the city . . . 12." All of the various City departments' budget proposals would go to the Mayor for review and approval, including the budget for the Police Department. Giordano acted as chairman of the City's Police Board meetings, made appointments to that Board, implemented new hiring polices for the City's Police Department, and played a key role in promoting police officers. In addition, the City's Police Department regularly alerted the Mayor of serious crimes scenes, and the Mayor would arrive at those scenes in his City-issued police cruiser and be briefed by the officer in charge. The Mayor also watched over police drug raids and other crime-fighting operations within the City.

Giordano promulgated the City's Sexual Harassment Policy, which stated that sexual harassment is a violation of Title VII of the Civil Rights Acts of 1964, as well as Connecticut State Law. The policy expressly

provided that "supervisors shall not use their authority to solicit subordinates for sexual favors . . . ." The policy defined physical sexual harassment as "[u]nwanted physical contact, including touching, pinching, brushing the body, coerced sexual intercourse, and assault."

The District Court found that Giordano was a final policymaker for the City of Waterbury, but it concluded that municipal liability did not attach because Giordano was not acting in his official capacity when he sexually abused Plaintiffs. *Doe*, 453 F. Supp. 2d at 544. The District Court found that Giordano was "generally a final policymaker for Waterbury," *id.* but a finding of general policymaking power on the part of the Mayor is not sufficient for municipal liability to attach. In *Jeffes*, we made clear that "[t]he court must ask whether [the] governmental official [is a] final policymaker [ ] for the local government in a particular area, or on [the] particular issue involved in the actions." 208 F.3d at 57 (internal quotation marks and citation omitted). Here, it cannot be said that the Mayor had policymaking authority with respect to the acts of sexual abuse he committed.

The Charter may have given the mayor power and influence over the activities of the Police Department, which is one instrument of the state's authority under its "police powers" to protect the health and safety of the citizenry. *Cf. Desiano v. Warner-Lambert & Co.*, 467 F.3d 85, 86 (2d Cir. 2006) ("[I]t has long fallen within the province of states [pursuant to their police powers] to safeguard the health and safety of their citizens."). However, the Charter did not grant the Mayor the power to change or violate clearly established law. As this Court held in *Jeffes*, in order to fasten liability upon

a municipality for the specific acts of an official, the official in question "must be responsible under state law for making policy in that area of municipality's business," and that the official "must possess [ ] final authority to establish municipal policy with respect to the action ordered." 208 F.3d at 57 (internal quotation marks and citations omitted).

In support of their position, Plaintiffs-appellants rely on cases from other Circuits that have found municipal liability for single acts of policymakers, many of which involved retaliatory conduct, including firings, by policymakers. We find that the cases involving retaliatory conduct are inapposite because of the distinct facts presented here.

First, Plaintiffs cite *Hollins v. Powell*, 773 F.2d 191 (8th Cir. 1985), in which the Eighth Circuit held the city of Wellston, Missouri liable for its mayor's actions. In *Hollins*, volunteer commissioners appointed by the mayor's predecessor assembled for a meeting at city hall, and the mayor had the commissioners arrested for "unlawful assembly" after he questioned the legality of their appointments and after they did not comply with his request to leave city hall. *Hollins* is distinguishable. In *Hollins*, the Eighth Circuit made clear that plaintiffs had proven that the mayor had the authority "under governmental structure of the City of Wellston" to have the plaintiffs arrested. *Id.* at 195. Thus, the official municipal policy caused the constitutional violation because the mayor of Wellston was acting wholly within and pursuant to the policy and powers granted him. *See id.* (The arrest was "not merely an aberrant act of a high city official . . . . [The mayor] had under the governmental structure of the City of Wellston the

authority to order [the commissioners'] arrest or "removal" from City Hall.").

In *Williams v. Butler*, 863 F.2d 1398 (8th Cir. 1988), which Plaintiffs also rely on, the Eighth Circuit held that the city of Little Rock, Arkansas could be held liable for an elected traffic court judge's firing of two employees who reported the judge's destruction of traffic tickets to the police. *Williams* is also distinguishable. In that case, it was clear that the traffic court judge had the exclusive authority to hire and fire personnel and that the personnel served at his "sole pleasure." *Id.* at 1399. Thus, as in *Hollins*, the official policy caused the violation because the traffic court judge was acting pursuant to and wholly within, not in violation of, the authority delegated to him. *See Williams*, 863 F.2d at 1402 (explaining that the traffic court judge was a final policymaker and that he was "exercising policymaking authority" when he fired the two employees).

Equally inapposite is *Patterson v. Utica*, 370 F.3d 322 (2d Cir. 2004). That case involved a stigma-plus claim based on the firing of municipal employees by the mayor of Utica, New York. *Patterson* is like *Williams* in that the mayor had exclusive appointment authority, so the mayor was acting within and pursuant to the authority granted him. Similarly, *Rookard v. Health & Hospitals Corp.*, 710 F.2d 41, 45 (1983), involved a Health and Hospital Corporation official's allegedly retaliatory transfer and eventual firing of a nurse. In *Rookard*, the official had full authority to order both the transfer and the discharge. *Id.*

On similar grounds, in *Gronowski v. Spencer*, 424 F.3d 285 (2d Cir. 2005), we affirmed a jury's finding that the city of Utica, New York was liable under section 1983 where the mayor was responsible for the unlawful termination of the plaintiff in retaliation for her support of a rival of the mayor. *See id.* at 296-97. Like *Williams*, *Patterson*, and *Rookard*, the mayor of Utica was exercising power granted to him in his capacity as mayor when he unlawfully terminated the plaintiff. Thus, it can be said that the municipal policy -- the mayor's final authority over hiring and firing -- caused the constitutional injury, thereby satisfying the "official policy" element for municipal liability under § 1983.

Throughout the above-cited cases, the courts predicated municipal liability on the fact that the municipalities had officially vested the actors with the authority to carry out the actions causing the civil rights violations. The individuals in those cases violated the constitutional rights of another person in furtherance of municipal policies -- the municipal policies therefore were the "moving force" behind the constitutional injuries. Here, however, the actions taken by Giordano were in an area in which he was not a policymaker. Giordano had no authority to make policy authorizing, condoning, or promoting the sexual abuse of children. Regardless of what broad powers he had as a mayor, the state of Connecticut has made the policy (and the laws) prohibiting such conduct. Giordano might, at most, be said to have had some enforcement power with respect to the crime of sexual abuse based on his authority over the police department.

Plaintiffs also rely on two Fifth Circuit cases, but we do

not agree with the approach taken in those cases. *Turner v. Upton County, Texas* reversed a summary judgment in favor of Upton County, our sister circuit holding that the county would be liable if the plaintiff could prove that: the sheriff planted illegal drugs on plaintiffs' business premises and, after seizing the drugs pursuant to an arrest warrant and securing an indictment against her, conspired with the county's district attorney to force her to trial, for which he had secured perjured testimony. 915 F.2d 133 (5th Cir. 1990). *Turner* explained:

The county contends that it cannot be subject to liability because it did not authorize the sheriff to violate the law. This argument is without merit. Where a final policymaker abuses the powers vested in his position to the detriment of a citizen, that abuse can be the basis for suit being brought under section 1983.*Id.* at 137 n.3. In our view, however, the sheriff in *Turner* was not a final policymaker -- his conduct amounted only to tortious acts under the color of law.

Nevertheless, even assuming the Sheriff in *Turner* was a policymaker, that case is distinguishable. There, at least something of a nexus existed between the sheriff's actions and his job functions, which presumably included investigating and apprehending criminals and assisting the prosecutor in securing convictions. Here, however, there was nothing in Giordano's behavior that could have advanced any conceivable job function or any conceivable policy goal or interest of the City. Thus, even if advancing an otherwise legitimate policy goal in an illegal or unauthorized manner can, under some circumstances, fall within official policymaking, advancing a purely personal agenda clearly cannot.

Plaintiffs also rely on *Bennett v. Pippin*, 74 F.3d 578 (5th Cir. 1996), in which a county sheriff went to the plaintiff's house to question her regarding a murder investigation and, during the course of the questioning, raped her. *Id.* at 586. The court held that the rape could constitute a county policy because the sheriff's "relationship with Bennett grew out of the attempted murder investigation and because . . . he used his authority over the investigation to coerce sex with her." *Id.* The Fifth Circuit reasoned that "[t]he fact that rape is not a legitimate law enforcement goal does not prevent the Sheriff's act from falling within his law enforcement function." *Id.* The Fifth Circuit explained that the existence of a well-defined official policy contrary to the policymaker's decision would not insulate the municipality from liability. *Id.* Since the sheriff acted tortiously under the color of law, the Fifth Circuit reasoned that the municipality should also be held liable. *Id.* In our view, *Bennett* cannot be reconciled with *Pembaur* and *Praprotik's* prohibition against finding municipal liability based on *respondeat superior*. Consequently, we decline to follow the Fifth Circuit's reasoning with respect to municipal liability under § 1983.

A finding of municipal liability in this case would amount to a finding of *respondeat superior* and would be an unwarranted expansion of the single-act rule set forth in *Pembaur*. It would also conflate the color of law inquiry with the official policy inquiry. An official acts within his official policymaking capacity when he acts in accordance with the responsibility delegated him under state law for making policy in that area of the municipality's business. *See Jeffes*, 208 F.3d at 57. An

official acts wholly outside his official policymaking capacity when he misuses his power to advance a purely personal agenda. Here, Giordano acted neither pursuant to nor within the authority delegated to him when he committed the acts of sexual abuse. Summary judgment is appropriate in this case because the Plaintiffs are unable, as a matter of law, to "com[e] forward with evidence that would be sufficient, if all reasonable inferences were drawn in [their] favor, to establish existence of" the official policy element for municipal liability under § 1983. *Grain Traders, Inc.*, 160 F.3d at 100. Therefore, we affirm the holding of the district court finding that liability cannot be imposed on the City of Waterbury under § 1983.

IV. *Collateral Estoppel*

Plaintiffs also seek to apply the doctrine of offensive collateral estoppel to prevent the City of Waterbury from relitigating the color of law element of § 1983 liability based upon the Mayor's previous conviction under 18 U.S.C. § 242 for sexually abusing Plaintiffs.

The doctrine of offensive collateral estoppel permits a plaintiff to bar a defendant from relitigating an issue that was decided in a prior case against the defendant. To do so, a plaintiff must show that:

(1) the issues of both proceedings are identical; (2) the relevant issues were actually litigated and actually decided in the prior proceedings; (3) there was a full and fair opportunity for the litigation of the issues in the prior proceeding, and (4) the issues were necessary to support a valid and final judgement on the merits.*Cent. Hudson Gas & Elec. Corp. v. Empresa*

Naviera Santa S.A., 56 F.3d 359, 368 (2d Cir. 1995). In Giordano's criminal trial, the Government was required to prove that (1) Giordano "willfully" and (2) under color of law (3) deprived a person of rights protected by the Constitution or laws of the United States. *United States v. Giordano*, 442 F.3d 30, 42-47 (2d Cir. 2006); *see* Doe, 453 F. Supp. 2d at 550. The District Court found that collateral estoppel could not be applied because the color-of-law issue in this case is not identical to the color-of-law issue in the criminal case. Although we ruled that Giordano was acting under color of law when he molested the Plaintiffs, the claims here fail under the "official policy" element. We therefore see no need to make a determination as to whether the requirements for the application of offensive collateral estoppel have been satisfied.

V. *State Law Claims*

Plaintiffs also challenge the District Court's grant of summary judgment in favor of Defendants as to their state law tort claims, which included intentional infliction of emotional distress, negligent infliction of emotional distress, sexual assault, battery, and negligent supervision. *See Doe, 453 F. Supp. 2d at 548.* The District Court found that Plaintiffs' state law claims were barred by government immunity pursuant to Connecticut law. *See* CONN. GEN. STAT. § 52-557n(a)(2)(A) ("Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by: (A) Acts or omissions of any employee, officer or agent which constitute criminal conduct, fraud, actual malice or wilful misconduct.") Roe argues that Connecticut law provides for an exception to government immunity

where a state official was acting within the scope of his official duties.

If Giordano had been acting as a final policymaker, the exception cited by Roe, *see* CONN. GEN. STAT. § 52-557n(a)(1), might overcome governmental immunity as to the negligent infliction of emotional distress and negligent supervision claims. *See id.* ("Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of . . . any employee, officer or agent thereof acting within the scope of his employment or official duties.") n3 However, because Giordano was not a final policymaker for the subject matter encompassing his tortious acts, he was not acting in his official capacity when he committed those acts, and the exception set forth in CONN. GEN. STAT. § 52-557n(a)(1) therefore does not bar the application of governmental immunity with respect to the claims grounded in negligence. As for the other claims, the City is protected by governmental immunity from Giordano's acts, which were criminal as well as intentionally tortious. *See McCoy v. City of New Haven*, 92 Conn. App. 558, 568 (Conn. App. Ct. 2005) (affirming dismissal of claim pursuant to C.G.S. § 52-557n(a)(2)(A) based on intentional tort committed by city employee). Accordingly, we affirm the District Court's summary judgment dismissing the state law claims against the City.

CONCLUSION

The judgment of the District Court is AFFIRMED.

Footnotes

*The Honorable Thomas J. McAvoy of the United States District Court for the Northern District of New York, sitting by designation

1Giordano's conduct that is the subject of this action was discovered during an investigation by the FBI and IRS into political corruption in the City of Waterbury. In the course of surveillance, the government intercepted 151 calls on Giordano's cell phones to or from Jones. *See United States v. Giordano*, 442 F.3d 30, 33 (2d Cir. 2006).

2The Defendants filed only one motion seeking summary judgment against both Plaintiffs, although the Roe and Doe actions were not consolidated by the District Court until April 7, 2006.

3Roe also relies upon *Colon v. City of New Haven*, 60 Conn. App. 178, 758 A.2d 900 (Conn. App. 2000), which held that CONN. GEN. STAT. § 52-557n(a)(2)(A) does not abrogate the common law exception to government immunity for the performance of discretionary acts "where the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm . . . ." Colon, 60 Conn. App. at 184. However, Colon is inapposite because that case involved an official's discretionary acts, which the court defined as an official act "the hallmark [of which] is that it requires the exercise of judgment." *Id.* at 181. Giordano's acts cannot be considered discretionary acts.

CIVIL ACTION NO. 3:01cv2298 (SRU) (consolidated with 03cv571)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

JANE DOE, JR. and SUSAN ROE, JR., Plaintiffs,

v.

THE CITY OF WATERBURY and PHILIP GIORDANO, Defendants.

September 28, 2006, Decided
September 29, 2006, Filed

COUNSEL: For Jane Doe, Sr., Ind & PPA Jane Doe, Jr, Plaintiff: Erskine D. McIntosh, Law Offices of Erskine D. McIntosh, Hamden, CT; Lawrence M. Herrmann, Cheshire, CT; Michael Stanton Hillis, Dombroski; Knapsack & Hillis, New Haven, CT; Michael W. Mackniak, Naugatuck, CT.

For Jane Doe, Jr., Consol Plaintiff: Allison Louise Jacobs, Hamden, CT; Lawrence M. Herrmann, Cheshire, CT; Gerald Lewis Harmon, Meriden, CT; Michael Stanton Hillis, Dombroski, Knapsack & Hillis, New Haven, CT.

For Jane Doe, Sr., Jane Doe, Sr., PPA, Consol Plaintiff: Lawrence M. Herrmann, Cheshire, CT.

For Susan Doe, Jr., next friend and ppa Atty Lynn Jenkins, Guardian Ad Litem, Consol Plaintiff: Erskine D. McIntosh, Law Offices of Erskine D. McIntosh,

Hamden, CT; Gerald Lewis Harmon, Meriden, CT; Lynn Jenkins, L Jenkins Law Office, New Haven, CT.

For Susan Roe, Sr., PPA, Consol Plaintiff: Erskine D. McIntosh, Law Offices of Erskine D. McIntosh, Hamden, CT; Gerald Lewis Harmon, Meriden, CT.

For City of Waterbury, Defendant: Elliot B. Spector, Noble, Spector, Young & O'Connor, Hartford, CT.

For Philip Giordano, I/O Mayor City of Waterbury & Principal in the Law Offices of Philip Giordano, Defendant: Andrew B. Bowman, Law Offices Of Andrew Bowman, Westport, CT; Elliot B. Spector, Noble, Spector, Young & O'Connor, Hartford, CT.

For Darlene Darlene Dunbar, Commissioner, Children and Families, Movant: Susan T. Pearlman, Attorney General's Office, Hartford, CT.

JUDGES: Stefan R. Underhill, United States District Judge.

OPINION BY: Stefan R. Underhill

OPINION

RULING ON MOTIONS FOR SUMMARY JUDGMENT

Between November 2000 and July 2001, Philip Giordano, then-mayor of the City of Waterbury ("Waterbury"), sexually abused the two minor plaintiffs, Jane Doe, Jr. ("Doe") and Susan Roe, Jr. ("Roe"), on

numerous occasions at the mayor's office, home, and in his city-issued police cruiser.

In September 2001, a federal grand jury returned an 18-count superceding indictment. Specifically, the indictment charged Giordano with: (1) depriving two minor children of their due process liberty right to be free from sexual abuse, in violation of 18 U.S.C. § 242; (2) conspiring to knowingly initiate the transmission of the minor victims' names by using means of interstate commerce, in violation of 18 U.S.C. §§ 2425 and 371; and (3) knowingly initiating the transmission of the minor victims' names by using means of interstate commerce with the intent to encourage them to engage in sexual activity, in violation of 18 U.S.C. § 2425. On March 25, 2003, a jury found Giordano guilty of 17 of the 18 counts, including the two counts charging Giordano with acting under color of law to deprive Doe and Roe of their constitutional rights to be free from unwanted sexual abuse. Subsequently, the District Court denied Giordano's motion to set aside the verdict, and the Second Circuit Court of Appeals affirmed Giordano's conviction.

Doe and Roe each filed a civil lawsuit against Giordano and Waterbury, [1] primarily alleging violations of 42 U.S.C. § 1983 and state law. Each has filed a motion for summary judgment against Giordano and Waterbury, and Waterbury filed a cross-motion for summary judgment against both Doe and Roe. On April 4, 2006, I heard oral arguments on all pending motions. [2] As of that date, Giordano had not responded to the motions for summary judgment, and to date, has essentially not responded to the motions. At oral argument, Giordano submitted a copy of his Petition for a Rehearing En

Banc by the Second Circuit Court of Appeals as his response. See Doc. # 96.

I. Standard of Review

Summary judgment is appropriate when the evidence demonstrates that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (party must present affirmative evidence in order to defeat a properly supported motion for summary judgment).

When ruling on a summary judgment motion, the court must construe the facts in the light most favorable to the nonmoving party and must resolve all ambiguities and draw all reasonable inferences against the moving party. *Anderson*, 477 U.S. at 255; *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970); see also *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d. 520, 523 (2d Cir. 1992) (court is required to "resolve all ambiguities and draw all inferences in favor of the nonmoving party"), cert. denied, 506 U.S. 965, 113 S. Ct. 440, 121 L. Ed. 2d 359 (1992). When a motion for summary judgment is properly supported by documentary and testimonial evidence, however, the nonmoving party may not rest upon the mere allegations or denials of his pleadings, but rather must present significant probative evidence to establish a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S. Ct. 2548, 91 L.

Ed. 2d 265 (1986); *Colon v. Coughlin*, 58 F.3d 865, 872 (2d Cir. 1995).

"Only when reasonable minds could not differ as to the import of the evidence is summary judgment proper." *Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir. 1991), cert. denied, 502 U.S. 849, 112 S. Ct. 152, 116 L. Ed. 2d 117 (1991); see also *Suburban Propane v. Proctor Gas, Inc.*, 953 F.2d 780, 788 (2d Cir. 1992). If the nonmoving party submits evidence that is "merely colorable," or is not "significantly probative," summary judgment may be granted. *Anderson*, 477 U.S. at 249-50.

The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.

Id. at 247-48. To present a "genuine" issue of material fact, there must be contradictory evidence "such that a reasonable jury could return a verdict for the non-moving party." *Id.* at 248.

If the nonmoving party has failed to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof at trial, then summary judgment is appropriate. *Celotex*, 477 U.S. at 322. In such a situation, "there can be 'no genuine issue

as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 322-23; accord *Goenaga v. March of Dimes Birth Defects Foundation*, 51 F.3d 14, 18 (2d Cir. 1995) (movant's burden satisfied if he can point to an absence of evidence to support an essential element of nonmoving party's claim). In short, if there is no genuine issue of material fact, summary judgment may enter. *Celotex*, 477 U.S. at 323.

II. Discussion

The pending motions for summary judgment raise three legal issues: (1) whether there is a genuine issue of material fact concerning Waterbury's liability under either section 1983 or state law; (2) whether a claim against Giordano in his official capacity is legally the same as a claim against Waterbury; and (3) whether there is any genuine issue of material fact concerning Giordano's individual liability under federal and state law.

A. Municipal Liability

1. Section 1983 Legal Standard

With respect to a section 1983 claim, a plaintiff must prove four elements: (1) actions taken under color of law; (2) deprivation of constitutional or statutory right; (3) causation; and (4) damages. See 42 U.S.C. § 1983. When a plaintiff brings a section 1983 claim against a municipality, she must prove a fifth element - that an official policy of the municipality caused her constitutional injury. See *Monell v. Dep't. of Social*

Services of the City of New York, 436 U.S. 658, 690-91, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .

(emphasis supplied). Local governments and municipalities are "persons" within the meaning of the statute, and therefore liability may attach to municipalities under section 1983. *Monell*, 436 U.S. at 690; *City of St. Louis v. Praprotnik*, 485 U.S. 112, 121, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988). The Monell Court limited municipal liability under section 1983, however, by concluding that a municipality may not be found liable based on the vicarious liability theory of respondeat superior. *Monell*, 436 U.S. at 691. Instead, a municipality may only be sued directly if a plaintiff alleges that a "municipal policy of some nature caused a constitutional tort." *Id.* In other words, a municipality may not be found liable simply because one of its employees or agents committed a tort. *Board of County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, 405, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997).

After evaluating the legislative history of section 1983, the United States Supreme Court has concluded that vicarious liability would be inconsistent with section

1983's causation requirement. *Praprotnik*, 485 U.S. at 122. As a result, "the 'official policy' requirement was intended to distinguish acts of the municipality from acts of employees of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986). See also *Nicholson v. Scoppetta*, 344 F.3d 154, 165 (2d Cir. 2003) (explaining that plaintiff must show that municipality is actually responsible for her injury). The Supreme Court has emphasized that:

[I]t is not enough for a § 1983 plaintiff merely to identify conduct properly attributable to the municipality. The plaintiff must also demonstrate that, through its deliberate conduct, the municipality was the "moving force" behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.

Brown, 520 U.S. at 404.

The decisions interpreting Monell have discussed several ways in which a plaintiff may establish an official municipal policy. [3] Relevant to this case, "municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances." *Pembaur*, 475 U.S. at 480. When a plaintiff's theory of municipal liability is based on showing that a single action by a municipal employee caused the constitutional injury, rather than showing that a formally adopted or ratified municipal policy

caused the injury, a plaintiff must demonstrate that the official had final policymaking authority for the particular subject matter involved. *Praprotnik*, 485 U.S. at 123-25; *Jett v. Dallas Independent School District*, 491 U.S. 701, 737, 109 S. Ct. 2702, 105 L. Ed. 2d 598 (1989); *Jeffes v. Barnes*, 208 F.3d 49, 57 (2d Cir. 2000).

Whether an official has final policymaking authority is a legal question, determined on the basis of state law. *Jeffes*, 208 F.3d at 57. The critical inquiry is not whether an official generally has final policymaking authority; rather, the court must specifically determine whether the government official is a final policymaker with respect to the particular conduct challenged in the lawsuit. *Id.* (citing *Praprotnik*,

485 U.S. at 123; *Jett*, 491 U.S. at 737; *Pembaur*, 475 U.S. at 481). See also *Rookard v. Health and Hospitals Corp.*, 710 F.2d 41, 45 n.3 (2d Cir. 1983). An official has final authority if his decisions, at the time they are made, "may fairly be said to represent official policy." *McMillian v. Monroe County*, 520 U.S. 781, 784, 117 S. Ct. 1734, 138 L. Ed. 2d 1 (1997); *Anthony v. City of New York*, 339 F.3d 129, 139 (2d Cir. 2003).

2. Application of Official Policy Requirement

The plaintiffs argue that Waterbury is liable for Giordano's actions, because Giordano was the mayor and final policymaker of Waterbury in the areas of law enforcement, safety, and social issues. When he acted, it was as if Waterbury acted. According to the plaintiffs' theory, the mayor was the City of Waterbury and his actions necessarily constituted Waterbury's official

policy. Additionally, plaintiffs argue that Waterbury is liable for Giordano's actions because he used his powers as mayor to carry out the abuse of the plaintiffs. Waterbury acknowledges that Giordano was generally a final policymaker for Waterbury, but argues that his actions in this particular case exceeded the bounds of the authority granted to him by Waterbury. As such, Giordano's unauthorized personal actions cannot be said to fairly represent the official policy of Waterbury, nor would it be fair to characterize Waterbury as the moving force behind Giordano's actions.

I conclude that Waterbury is not responsible for Giordano's decision to sexually abuse the plaintiffs for his personal gratification, because Giordano's actions did not constitute an official policy of Waterbury. There are three main reasons that support my conclusion: (1) municipal liability cannot be based on a vicarious liability theory of respondeat superior; (2) although Giordano is generally a final policymaker for Waterbury, Giordano's specific actions in this case cannot be fairly said to represent official policy, because under state law, he exceeded the bounds of the authority granted to him; and (3) the fact that Giordano used the powers of his office to carry out the abuse does not establish an official policy, but rather merely satisfies the color of law requirement of a section 1983 claim.

a. Respondeat Superior Liability

Not every action taken by a final policymaker creates a policy for the municipality. Policymakers retain aspects of their day-to-day affairs that are personal, rather than official, in nature. In order to fairly assess liability,

particularly when municipal liability is at issue, courts must separate the acts of the policymaker as policymaker, which could potentially impose liability on the municipality, from the acts of policymaker as an individual. See *Brown*, 520 U.S. at 403-07. The decisions interpreting Monell hold that a municipality cannot be made liable simply because one of its agents or employees commits a tort. When a plaintiff's theory of municipal liability is based on a single action committed by a final policymaker, it follows that the municipality can only be liable when the final policymaker is acting in his policymaking capacity, not in his personal capacity. See *Jeffes*, 208 F.3d at 57-58.

In distinguishing the actions of a municipality from the actions of its agents, courts must recognize that the only way a municipality can act is through its agents. *Auriemma v. Rice*, 957 F.2d 397, 399 (7th Cir. 1992). In order to establish municipal liability, it is not enough for a plaintiff simply to point to an agent who acted on behalf of the municipality, because that would only be sufficient to establish vicarious liability. *Id.* at 400. Rather, the plaintiff must show that when the agent of the municipality acted, he was creating policy for the municipality. "That a particular agent is the apex of a bureaucracy makes the decision 'final' but does not forge a link between finality and policy." Id.

Here, although the plaintiffs have shown that Giordano sexually abused the plaintiffs during a period of time when he also happened to be the mayor of Waterbury, they have not shown that Giordano was acting in his final policymaking authority as mayor when he abused the plaintiffs. [4] As a result, the plaintiffs have not shown that Waterbury was the moving force behind

Giordano's abuse of the plaintiffs. See *Brown*, 520 U.S. at 400. Plaintiffs have attempted to satisfy that standard by arguing that Giordano's actions were synonymous with the actions of Waterbury, because he was the mayor. Because there is no dispute that Giordano was the moving force behind his abuse of plaintiffs, they argue that since his actions were synonymous with the municipality, Waterbury was also the moving force.

That argument is not persuasive, because when Giordano acted, he was not acting in his policymaking capacity and therefore Waterbury was not the moving force behind his actions. Plaintiffs are essentially making a respondeat superior argument, which is forbidden by Monell. Fundamentally, a municipality may not be held liable for the actions of its employees or agents on a respondeat superior theory; the municipality is only liable if a policy attributable to the municipality inflicts injury on a plaintiff. *Batista v. Rodriguez*, 702 F.2d 393, 397 (2d Cir. 1983); see *Monell*, 436 U.S. at 663 (deciding that municipal liability cannot be based on respondeat superior theory). "In fact, avoiding results that are indistinguishable from respondeat superior appears to be a primary concern of Supreme Court jurisprudence on municipal liability." *Russo v. City of Hartford*, 341 F. Supp. 2d 85, 107 (D. Conn. 2004) (citing *Praprotnik*, 485 U.S. at 126). The decisions interpreting Monell make it clear that in enacting section 1983, "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Pembaur*, 475 U.S. at 477.

Here, Giordano's decision to abuse two minors may not be "fairly said" to represent the official policy of Waterbury. The evidence in the record shows that Waterbury's policy was to stop and prevent abuse. There is no evidence in the record that any other Waterbury officials knew about or failed to prevent Giordano's actions. [5] Giordano's actions contravened Waterbury's official policy.

Those facts are not necessarily dispositive, because in certain circumstances a mayor's actions that contravene an established municipal policy could as a matter of law create new policy sufficient to impose liability on the municipality. In this case, however, Giordano was not performing the functions of a mayor when he abused the plaintiffs. His behavior towards the plaintiffs was entirely personal and did not serve any public purpose. He was purposefully and actively breaking the law and contravening established policy, not for any purpose associated with the functions of his job as mayor, but for his personal gratification. Waterbury employed a tortfeasor, who happened to be at the apex of executive authority. Imposing liability on Waterbury in that instance would impermissibly blur the line between a municipality and its employees in a manner forbidden by *Monell* and subsequent decisions.

b. Liability for Unauthorized Actions is Personal

When Giordano abused the plaintiffs he was frustrating municipal policy, not implementing it; his actions at issue in this case did not rise to the level of official policy. See *Kohler v. City of Wapakoneta*, 381 F. Supp. 2d 692, 712 (N.D. Ohio 2005) (holding that municipality was not liable for final policymaker's unauthorized,

personal acts not taken in the course of any official function). Giordano was not authorized to make final policy for Waterbury by engaging in personal acts of sexual abuse. See id. In order for a municipality to be held liable for the torts of its agents, the agent must have the authority to make final policy in the area at issue in the lawsuit. *Jeffes*, 208 F.3d at 57-58. The issue whether an official has final policymaking authority in a particular area is a question of state law. Id.

Here, plaintiffs argue that the Waterbury City Charter ("Charter") gave Giordano broad powers as mayor in the areas of public safety, law enforcement, and social issues, and that because of those broad powers, he was always acting as a role model for the citizens of Waterbury. Plaintiffs argue that Waterbury cloaked Giordano with tremendous authority as mayor and because Waterbury gave him so much power, it is responsible for his actions.

In reality, however, Giordano acted in a manner that was not authorized by the Charter and was therefore outside the scope of the powers Waterbury granted to him. The Charter gives the mayor substantial executive powers. See Appendix to Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment, Addendum # 2. Those powers, however, are framed in terms of helping the mayor to carry out the functions of his official position. For example, the Charter gives the mayor authority to make appointments, communicate with the board of aldermen, and sign contracts on behalf of the city. See id. Specifically, Section 2101(a) of the Charter provides that the mayor should "cause the laws and ordinances to be executed and enforced." See id. If Giordano committed a constitutional tort while

enforcing a law, Waterbury might arguably be liable. In this case, however, Giordano was not enforcing laws on behalf of the City; he was breaking them for his personal benefit. The Charter did not grant him any powers with respect to any activities associated with breaking laws. Indeed, Giordano was not carrying out any of the functions of his job as mayor when he abused the plaintiffs; he was acting in a personal capacity.

In a typical municipal liability case, the municipal official performs a function of his job but does so in a way that is alleged to be unconstitutional (i.e., makes a hiring decision, but uses discriminatory practices to do so). In such a case, a charter that delegates almost unlimited power to the mayor to make hiring decisions might subject the municipality to liability if the mayor uses the power to carry out a discriminatory decision. In this case, the Charter did not authorize Giordano to use his powers as mayor to sexually abuse plaintiffs for his personal gratification. Giordano acted outside the scope of the authority granted to him by the Charter, and therefore, he was not authorized to make final policy for Waterbury when he abused the plaintiffs. See *Jeffes*, 208 F.3d at 57-58.

In *Wooten v. Logan*, 92 Fed. Appx. 143, 146-47, 2004 WL 68541, 3 (6th Cir. 2004), the Sixth Circuit Court of Appeals held that the high sheriff, although he was a final policymaker, did not subject the municipality to liability for his rape of a mentally disabled child. Despite the fact that he used his police cruiser and flashing lights to effectuate the rape, the court held that "his conduct cannot conceivably be characterized as exercising a power to set policy." Id. The plaintiff in Wooten attempted to analogize *Pembaur*, 475 U.S. at

480 (holding that municipal liability may imposed based on the single decision of a municipal policymaker under appropriate circumstances), to her facts to argue that actions taken by a final policymaker in the area in which he has general final policymaking authority subject the municipality to liability. The Sixth Circuit's reasoning in rejecting that argument is instructive:

Given these alleged facts, Wooten can state a claim against the County only if every "law enforcement" activity (e.g., stop, arrest, etc.) by a sheriff (or other chief law enforcement official) - whether a matter of official business or a misuse of power to advance a private agenda - represents the "official policy" of the local government. Such a rule would contravene Pembaur's attempt "to distinguish acts of the municipality from acts of employees of the municipality." *Pembaur*, 475 U.S. at 469, 106 S. Ct. 1292 (emphasis in original), and would institute the doctrine of respondeat superior. Accordingly, Logan's conduct cannot represent "official policy," and the County is not liable for Logan's conduct.

Id. The Sixth Circuit held that the sheriff's acts could not represent official policy when they necessarily contravened the existing official policy of the municipality and were in no way intended to influence or effectuate that policy. Id.

Plaintiffs argue that Giordano was a leader and role model for the citizens of Waterbury; therefore his powers and decisions taken as mayor must be broadly construed. Plaintiffs' argument proves too much; it would subject municipalities to liability for almost any action by a final policymaker, simply because that final

policymaker also happens to be a an official with a substantial amount of power in the municipal government. Although Giordano was a leader and role model, not every action he took was within the authority granted to him to set policy. His actions at issue in this case are too far removed from the powers given to him by Waterbury to manage the city to impose liability on Waterbury.

c. Giordano's Use of His Position as Mayor Merely Satisfies the "Color of Law" Element, Not the Municipal Policy Element

Citing *Bennett v. Pippin*, 74 F.3d 578 (5th Cir. 1996), plaintiffs contend that, because Giordano used the benefits of his position as mayor to carry out the sexual abuse, he was effectively acting as a policymaker and Waterbury should be liable. The facts of *Bennett*, however, are distinguishable from the facts of this case, and subsequent decisions have called Bennett into question.

In Bennett, the Fifth Circuit determined that the county sheriff's rape of a suspect in a murder investigation constituted a county policy sufficient to impose municipal liability. *Bennett*, 74 F.3d at 586. During the course of a murder investigation, the sheriff went to the plaintiff's house for the purpose of questioning her about the murder, and while there, he raped her. *Id.* at 581-83. The Fifth Circuit held that the sheriff's rape of a murder suspect could constitute a county policy, because the sheriff's "relationship with Bennett grew out of the attempted murder investigation, and because . . . he used his authority over the investigation to coerce sex with her." *Id.* at

586. The Fifth Circuit reasoned that "[t]he fact that rape is not a legitimate law enforcement goal does not prevent the Sheriff's act from falling within his law enforcement function." Id. Additionally the Fifth Circuit explained that the existence of a well-defined official policy to the contrary of the policymaker's decision would not insulate the municipality from liability. Id.

The facts of *Bennett* differ from the facts of this case. In Bennett, the sheriff was engaged in the legitimate law enforcement function of investigating a murder, and it was because of his official work in that law enforcement capacity that he raped the plaintiff. Here, Giordano was not engaged in any official function when he sexually abused the plaintiffs.

Plaintiffs argue, however, that Giordano, like the sheriff in Bennett, was only able to carry out the rape because he used his power as mayor to control the plaintiffs. The Sixth Circuit Court of Appeals rejected that same argument in *Wooten*, 92 Fed. Appx. at 146-47, 2004 WL 68541 at 4. In Wooten, the sheriff conspired with a non-county employee to rape a minor. The Sixth Circuit held that, even though the sheriff used his police lights, badge, uniform, and gun to effectuate the rape, the conduct could not "conceivably be characterized as exercising power to set policy." Id. The court explained that although the sheriff abused his power in order to carry out the rape, there was nothing about his abuse of power that was specific to his position as sheriff. He could have carried out the rape in the same way if he was a lower-level officer, and therefore he was not specifically using policymaking powers when he raped the plaintiff. Id. Similarly, here,

plaintiffs argue that Giordano used his power as mayor to keep the plaintiffs from reporting him, because he threatened to arrest them or their family members. Giordano could have made the same threats if he was a lower level municipal officer; as such, he conduct cannot be attributed to his role as policymaker.

Additionally, plaintiffs emphasize that Giordano abused the plaintiffs in the mayor's office and used city-issued cell phones to arrange his encounters with plaintiffs. The fact that Giordano abused his power as mayor certainly tends to support plaintiffs' claim that he acted under color of law. See *United States v. Giordano*, 442 F.3d 30, 42-42 (2d Cir. 2006). When a plaintiff brings a claim against a municipality, however, it is not enough to show that an official acted under color of law. The plaintiff must also prove that there was a policy of the municipality that caused plaintiff's injury. See *Wooten*, 92 Fed. Appx. at 146-47, n.4, 2004 WL 68541 at 4.

The record evidence is insufficient to permit a reasonable jury to find that the official policy element of plaintiffs' municipal liability claims has been met.

3. State Law Claims

Additionally, both plaintiffs have filed several state law claims against Waterbury, including Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress, Sexual Assault, Battery, and Negligent Supervision. Plaintiffs and Waterbury have filed cross motions for summary judgment, seeking judgment on those claims. Doe's state law claims against Waterbury (Counts 4 and 9-11) and Roe's state law claims against Waterbury (Count 2) are barred by

governmental immunity. C.G.S. § 52-557n(a)(2) provides:

Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by: (A) Acts or omissions of any employee, officer or agent which constitute criminal conduct, fraud, actual malice or wilful misconduct; or (B) negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law.

Waterbury is not generally liable for the criminal conduct of its officers.

Plaintiffs argue that Giordano was the alter ego of Waterbury, and therefore, Waterbury should be liable. The purpose of the "alter ego theory" is to prevent individuals from being able to disguise their actions as those of corporations, in order to avoid liability. That theory does not apply here, because an individual cannot be indistinguishable from a city. Waterbury is a functioning city with elected officials, municipal offices, and typical municipal functions. Waterbury is a distinct, viable entity; thus, the alter ego theory does not apply.

In addition, with respect to Doe's negligent supervision claim, to the extent that Doe is arguing that the "identifiable victim subject to imminent harm" exception to the doctrine of governmental immunity applies, she has not cited any factual evidence from which a reasonable jury could find that exception applies. Specifically, there is not sufficient factual evidence from which a reasonable jury could conclude

that some other Waterbury employee knew about Giordano's actions and failed to take appropriate action.

In sum, I deny plaintiffs' motions for summary judgment and grant Waterbury's motion for summary judgment with respect to all state law claims.

4. Summary of Claims Relating to Waterbury

In sum, I am granting Waterbury's motions for summary judgment with respect to all claims against Waterbury, and I am denying plaintiffs' motions for summary judgment with respect to all claims against Waterbury. [6] Plaintiffs have failed to show that an official policy of Waterbury caused their constitutional injuries. Therefore, the plaintiffs' Monell claims fail as a matter of law. In addition, with respect to the plaintiffs' state law claims, governmental immunity shields Waterbury from liability for Giordano's actions at issue in this case.

B. Official Capacity Claim

In addition to their claims against Waterbury, plaintiffs have also filed claims against Giordano in his official capacity and are seeking summary judgment. An official capacity suit is simply another way of pleading a claim against a municipality. *Monell*, 436 U.S. at 690, n.55. It is treated in all respects as a suit against the municipality. *Kentucky v. Graham*, 473 U.S. 159, 165-66, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985). Therefore, although plaintiffs have also pleaded their claims against Giordano in his official capacity, they would still need to prove that a policy or practice of Waterbury caused the plaintiffs' injuries. Because they have not

done so, I am denying plaintiffs' motion for summary judgment against Giordano in his official capacity, and am entering summary judgment sua sponte in favor of Giordano in his official capacity for the reasons discussed above.

C. Individual Capacity Claims Against Giordano

1. Federal Claims[7]

I grant plaintiffs' summary judgment motions against Giordano in his individual capacity with respect to their section 1983 claims. Plaintiffs argue that I should base my decision on the doctrine of collateral estoppel. [8] Although it may appear at first glance that collateral estoppel applies, all of the elements have not been met. Rather, I base my decision on the fact that plaintiffs have submitted statements of undisputed facts pursuant to Rule 56, and Giordano has not submitted any evidence to refute those facts. Based on the undisputed evidence in the record, no reasonable juror could find for Giordano on plaintiffs' section 1983 claims.

There are four elements needed for collateral estoppel to apply: (1) identical issues in both proceedings; (2) the issue in the prior proceeding must have been actually litigated and actually decided; (3) there was a full and fair opportunity to litigate the issue in the prior proceeding; and (4) the issue previously litigated must have been necessary to support a valid and final judgment on the merits. [9] Gelb v. Royal Globe Insurance Co., 798 F.2d 38, 44 (2d Cir. 1986). Mutuality of estoppel is not required, so a party other than the government can assert collateral estoppel based on a prior criminal conviction. Id. at 43. Because the burden

of proof is higher in a criminal case, a party may rely on the collateral estoppel effect of that conviction in a later civil case. Id. In United States v. Giordano, 3:01cr216 (AHN), a jury found Giordano guilty of two counts of depriving the minor children who are plaintiffs in this case of their due process liberty right to be free from sexual abuse, in violation of 18 U.S.C. § 242. Section 242 provides, "Whoever, under color of any law . . . willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined under this title, or imprisoned . . . ." Pursuant to Rule 29 of the Federal Rules of Criminal Procedure, Judge Nevas denied Giordano's motion to set aside the guilty verdict. *United States v. Giordano*, 324 F. Supp. 2d 349, 352 (D. Conn. 2003). Additionally, the Second Circuit affirmed Giordano's conviction, including the two counts of depriving minor children of the right to be free from sexual abuse. United States v. Giordano, 442 F.3d 30 (2d Cir. 2006).

Although it may appear that collateral estoppel applies, upon closer inspection, all of the elements of collateral estoppel have not been met. In United States v. Giordano, 3:01cr216 (AHN), the instructions to the jury provided that, in order to find Giordano guilty on the relevant charge, the jury needed to find that Giordano's "conduct deprived victim one or victim two of some right secured or protected by the constitution of the United States . . . ." Appendix to the Plaintiffs' Memorandum of Law in Support of Motion for Summary Judgment, Transcript at 2102 (emphasis supplied). In addition, the jury instructions indicated that, in order to convict Giordano, the jury had to find that "his acts resulted in bodily injury to victim one or

victim two." Id. (emphasis supplied). Therefore, when rendering the verdict in the criminal case, the jury did not necessarily find each element of the crime with respect to each victim, since the jury was instructed that it could convict Giordano as long as it found each element with respect to either of the victims. The jury could have convicted Giordano on the relevant counts by finding that the government had proven certain of the elements with respect to one of the victims and certain of the elements with respect to the other. Thus, I cannot find that all of the elements of collateral estoppel have been met here, because the factual basis for the jury finding in the criminal case is not necessarily identical to the factual basis required for the claim in this case, that is, that every element has been met with respect to both -- or either one -- of the plaintiffs.

Instead, I base my decision on the fact that the plaintiffs have submitted sufficient evidence in their Rule 56 statements and accompanying exhibits from which no reasonable juror could find in Giordano's favor. With respect to a section 1983 claim, a plaintiff must prove four elements: (1) actions taken under color of law; (2) deprivation of constitutional or statutory right; (3) causation; and (4) damages. See 42 U.S.C. § 1983. Here, the undisputed evidence in the record demonstrates that Giordano acted under color of law to violate plaintiffs' constitutional rights not to be deprived of bodily integrity without due process of law, and that Giordano's actions caused them pain and discomfort. See Plaintiffs' Rule 56 Statement at PP 62-87. Giordano has not submitted any evidence to refute those facts. I conclude that, pursuant to Rule 56(e) of

the Federal Rules of Civil Procedure, summary judgment in favor of the plaintiffs is proper.

In addition, I am also sua sponte dismissing Counts 2 and 3 of Doe's amended complaint. Those counts raise claims against Giordano in his individual capacity pursuant to 42 U.S.C. §§ 1985 and 1986. Doe did not pursue those claims in her motion for summary judgment. In addition, those claims simply do not apply to the facts of this case as a matter of law. There is not evidence in the record from which a reasonable jury could find for Doe on those claims.

2. State Law Claims

Additionally, plaintiffs have filed several state law claims against Giordano in his individual capacity and now seek summary judgment on those claims. The plaintiffs have, in part, alleged different state law claims, which I have noted below. My ruling on each state law claim applies only to the extent that each plaintiff alleged that particular claim in her complaint.

a. Sexual Assault, Conspiracy to Commit Assault and Battery, and Assault and Battery [10]

The elements of the intentional tort of sexual assault, are: (1) harmful or offensive contact with a person; (2) intended to cause the person such contact; and (3) that results from an act. *Fernandez v. Standard Fire Ins. Co.*, 44 Conn. App. 220, 224, 688 A.2d 349 (1997). A civil battery requires: (1) that the defendant intended to cause a harmful or offensive contact, or an imminent apprehension of such contact, with another person, and (2) that a harmful contact directly or indirectly results.

Simms v. Chaisson, 277 Conn. 319, 331, 890 A.2d 548 (2006). A civil assault requires: (1) that the defendant intended to cause a harmful or offensive contact, or an imminent apprehension of such contact, with another person, and (2) that the other person was put in imminent apprehension as a result. *Id.* A civil conspiracy is: (1) a combination of two or more persons; (2) to perform a criminal or unlawful act or a lawful act by criminal or unlawful means; (3) an act taken by one or more of the conspirators pursuant to the scheme and in furtherance of the object; and (4) which results in damage to the plaintiff. *Macomber v. Travelers Property and Cas. Corp.*, 277 Conn. 617, 635-36, 894 A.2d 240 (2006) (citing *Harp v. King*, 266 Conn. 747, 779, 835 A.2d 953 (2003)). Conspiracy is not an independent claim; it must be linked with an allegation of a substantive tort. Id.

I am granting plaintiffs' motions for summary judgment against Giordano in his individual capacity with respect to the state law claims of sexual assault, assault and battery, and conspiracy to commit assault and battery, because there is no genuine issue of material fact concerning any of those claims. Plaintiffs have submitted evidence of each of those state law claims, and Giordano did not rebut that evidence. Pursuant to Rule 56(e) of the Federal Rules of Civil Procedure, summary judgment is proper. Although it may appear that the doctrine of collateral estoppel applies, I am not basing my decision on the doctrine of collateral estoppel for the reasons discussed above.

Doe argues that she is entitled to damages under 18 U.S.C. § 2255 with respect to her assault and battery claims. [11] That statute provides civil damages to victims

of persons who violate 18 U.S.C. §§ 2422, 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, or 2423. Section 2422 provides:

(a) Whoever knowingly persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce, or in any Territory or Possession of the United States, to engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.

Doe argues that Giordano "violated" section 2422, so he should be subject to the damage provision of section 2255. Giordano was not indicted, tried, or convicted under section 2422 or any of the other sections delineated above, and therefore, section 2255 does not apply here. In addition, this claim for damages is duplicitous, because plaintiffs will recover damages for the underlying conduct, i.e., sexual assault, assault, battery, and conspiracy to commit assault and battery, for which I am granting summary judgment in their favor. Accordingly, I am denying Doe's motion for summary judgment with respect to the damage provision of section 2255.

b. Conspiracy to Commit False Imprisonment & False Imprisonment [12]

I am granting Doe's motion for summary judgment against Giordano in his individual capacity with respect to her claims of false imprisonment and conspiracy to commit false imprisonment. "False imprisonment is the unlawful restraint by one person of the physical liberty

of another." *Rivera v. Double A Transp., Inc.*, 248 Conn. 21, 31, 727 A.2d 204 (1999). A person is liable for false imprisonment, if he acts "for the purpose of imposing a confinement, or with knowledge that such confinement will, to a substantial certainty, result from it." Id. A civil conspiracy is defined above.

Here, there is no dispute that Giordano knew the plaintiffs were minors. Doe's Rule 56(a) Statement P 65. Giordano removed the minors from their home to his office, home, or police cruiser for the purpose of sexually abusing them. There is no genuine issue of material fact that Giordano was substantially certain that confinement would result from his sexual abuse of the plaintiffs. Pursuant to Rule 56(e), summary judgment in favor of plaintiffs is proper.

c. Intentional Infliction of Emotional Distress [13]

There are four elements of an intentional infliction of emotional distress ("IIED") claim: (1) the defendant intended to inflict emotional distress, or knew or should have known that the emotional distress was a likely result of his conduct; (2) the conduct was extreme and outrageous; (3) the defendant's conduct was the cause of the plaintiff's distress; and (4) the distress suffered by the plaintiff was severe. *Golnik v. Amato*, 299 F. Supp. 2d 8, 14-15 (D. Conn. 2003) (citing *Appleton v. Stonington Bd. of Ed.*, 254 Conn. 205, 210, 757 A.2d 1059 (2000)).

Based on the undisputed evidence in the record, no reasonable jury could find for Giordano. The plaintiffs' Rule 56 statements and accompanying exhibits establish sufficient facts to support each element of an

IIED claim. Giordano has not refuted that evidence. In accordance with Rule 56(e), I am granting summary judgment in favor of plaintiffs on their claims for IIED against Giordano in his individual capacity.

d. Negligent Infliction of Emotional Distress [14]

There are four elements of a negligent infliction of emotional distress ("NIED") claim: "(1) The defendant's conduct created an unreasonable risk of causing the plaintiff's emotional distress; (2) The plaintiff's distress was foreseeable; (3) The emotional distress was severe enough that it might result in illness or bodily harm; and (4) The defendant's conduct was the cause of the plaintiff's distress." *Carrol v. Allstate Insurance Company*, 262 Conn. 433, 444, 815 A.2d 119 (2003).

I am granting plaintiffs' motions for summary judgment with respect to their claims for NIED against Giordano in his individual capacity. As described above, based on the undisputed evidence in the record, no reasonable jury could find for Giordano on these claims.

III. Conclusion

Plaintiffs' motions for summary judgment (docs. # 81 and # 105) are GRANTED in part and DENIED in part. With respect to all claims against Waterbury, plaintiffs' motions for summary judgment are DENIED. Doe's section 1985 and section 1986 claim, as well as her claim for damages under 18 U.S.C. § 2255 are DISMISSED. With respect to all remaining claims against Giordano in his individual capacity, plaintiffs' motions for summary judgment are GRANTED. Waterbury's motions for summary judgment against

plaintiffs (docs. # 88 and # 106) are GRANTED. I am sua sponte dismissing all claims against Giordano in his official capacity.

It is so ordered.

Dated at Bridgeport, Connecticut, this 28th day of September 2006.

/s/ Stefan R. Underhill

United States District Judge

Footnotes

1 Guitana Jones was, at one point, named as a defendant in this case. She is not named in either of the operative complaints or motions for summary judgment. By eliminating Jones as a defendant in their complaints, the plaintiffs are deemed to have dismissed their claims against Jones.

2 On April 4, 2006, I consolidated the two cases by oral order, and the clerk entered a notice of consolidation on April 7, 2006. See Doc. # 98.

3 For example, in addition to the approach taken in this case, a plaintiff could also show that a municipality formally promulgated an unconstitutional policy or practice, established a well-settled custom, or engaged in deliberately indifferent training or supervisory practices.

4 Giordano's use of the mayor's office and city-issued cell phones to carry out the abuse does not prove that

Giordano was acting in his policymaking authority when he abused plaintiffs; rather, those facts tend to establish that Giordano was acting under color of law, which is a different element of a section 1983 claim.

5 In their memorandum in support of summary judgment, plaintiffs mention that Giordano sexually abused plaintiffs in the home of the Waterbury budget director. The criminal indictment also listed the budget director's address as one of the locations where the abuse took place, although there is no evidence in the record that the jury found that alleged fact to be true. Moreover, there does not appear to be any evidence in the record that the budget director knew about the abuse.

6 In Jane Doe, Jr. v. The City of Waterbury, et al., 3:01cv2298 (SRU), I am granting summary judgment in favor of Waterbury on the portions of Counts 1, 2, 3, 4, 9, 10, and 11 in the amended complaint (doc. # 76-1) that allege claims against the City of Waterbury. In Susan Roe, Jr. v. The City of Waterbury, et al., originally filed as 3:03cv571 (SRU), I am granting summary judgment in favor of Waterbury on the portions of Counts 1 and 2 of the second amended complaint (doc. # 72) that allege claims against the City of Waterbury.

7 In Jane Doe, Jr. v. The City of Waterbury, et al., 3:01cv2298 (SRU), the plaintiff brought claims pursuant to 42 U.S.C. § 1983 (Count 1), 42 U.S.C. § 1985 (Count 2), and 42 U.S.C. § 1986 (Count 3). See Amended Complaint (doc. # 76-1). In Susan Roe, Jr. v. The City of Waterbury, et al., originally filed as 3:03cv571 (SRU), the plaintiff brought a claim only pursuant to 42 U.S.C.

§ 1983 (Count 1). See Second Amended Complaint (doc. # 72).

8 Plaintiffs have also raised a collateral estoppel argument with respect to claims against Waterbury. Because I am holding that collateral estoppel does not apply to the claims against Giordano, it is not necessary to decide the question whether Waterbury was in privity for purposes of determining if collateral estoppel applies to the claims against it. Rather, for the reasons already discussed, Waterbury is not liable for Giordano's actions at issue in this case.

9 Because I am not relying on the doctrine of collateral estoppel as the basis for my decision, I do not decide the question whether, under federal law, Giordano's decision to appeal his underlying criminal conviction would affect the finality of the judgment in the criminal case.

10 In Jane Doe, Jr. v. The City of Waterbury, et al., 3:01cv2298 (SRU), pursuant to the amended complaint (doc. # 76-1), the plaintiff has brought a claim for sexual assault (Count 4), conspiracy to commit assault and battery (Count 7), and assault and battery (Count 8). In Susan Roe, Jr. v. The City of Waterbury, et al., originally filed as 3:03cv571 (SRU), pursuant to the second amended complaint (doc. # 72), the plaintiff has brought a claim for battery (Count 2).

11 The claim for damages pursuant to 18 U.S.C. § 2255 arises only in Jane Doe, Jr. v. The City of Waterbury, et al., 3:01cv2298 (SRU), pursuant to Count 4 of the amended complaint (doc. # 76-1).

12 In Jane Doe, Jr. v. The City of Waterbury, et al., 3:01cv2298 (SRU), pursuant to the amended complaint (doc. # 76-1), the plaintiff has brought a claim against Giordano for false imprisonment (Count 6) and conspiracy to commit false imprisonment (Count 5).

13 In Jane Doe, Jr. v. The City of Waterbury, et al., 3:01cv2298 (SRU), pursuant to the amended complaint (doc. # 76-1), the plaintiff has brought a claim against Giordano for intentional infliction of emotional distress (Count 9). In Susan Roe, Jr. v. The City of Waterbury, et al., originally filed as 3:03cv571 (SRU), pursuant to the second amended complaint (doc. # 72), the plaintiff has brought a claim for intentional infliction of emotional distress (Count 2).

14 In Jane Doe, Jr. v. The City of Waterbury, et al., 3:01cv2298 (SRU), pursuant to the amended complaint (doc. # 76-1), the plaintiff has brought a claim against Giordano for negligent infliction of emotional distress (Count 10). In Susan Roe, Jr. v. The City of Waterbury, et al., originally filed as 3:03cv571 (SRU), pursuant to the second amended complaint (doc. # 72), the plaintiff has brought a claim for intentional infliction of emotional distress (Count 2).

Filed 12/16/08

Docket No. 07-0261-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUSAN ROE, Jr., ppa ATTY. LYNN JENKINS, GUARDIAN AD LITEM, and JANE DOE, Jr., ppa ATTY. ALLISON JACOBS,

Plaintiffs-Appellants,

v.

THE CITY OF WATERBURY, and PHILIP GIORDANO, I/O MAYOR OF THE CITY OF WATERBURY,

Defendants-Appellees.

ORDER

Appellant Susan Roe, Jr. having filed a petition for panel rehearing, or in the alternative, for rehearing en banc, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing en banc,

IT IS ORDERED that the petition is denied.